U.S. Department of Labor

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Date: January 7, 1999

Case No.: 1997-LHC-2467, 1998-LHC-553

OWCP No.: 5-95389, 5-96767

In the Matter of:

QUEEN E. WIGGINS,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer.

Appearances:

Gregory E. Camden, Esq.
For Claimant

Jonathan H. Walker, Esq.
For Employer

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the act"), 33 U.S.C. 901 et seq. Claimant seeks temporary total

disability benefits for the period from March 17, 1997 to June 30, 1997 and permanent total disability benefits for the period from July 1, 1997 to the present and continuing.

A formal hearing was held in this case on June 4, 1998 in Newport News, Virginia, at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. Claimant offered exhibits CX-1 through CX-12.[1] After the hearing, Claimant offered exhibits CX-13 through CX-16. Employer offered exhibits EX-1 through EX-17. After the hearing, Employer offered the deposition of David Karmolinski, which was marked as exhibit EX-18. All were admitted into evidence. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES [2]

1. Is Claimant's May 16, 1995 knee injury compensable under the act?
2. Has Claimant established a prima facie case of total disability ?
3. Has Employer met its burden of demonstrating the existence of suitable alternative employment?
4. Does Claimant's current position as a paper carrier for the News Herald reasonably reflect her wage-earning capacity?
5. What is the date of maximum medical improvement for Claimant's May 9, 1995 and May 16, 1995 injuries?
6. What is the applicable rate of compensation in this case?

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[1] The following abbreviations will be used as citations to the record:
CX - Claimant's Exhibits
EX - Employer's Exhibits
Tr. - Transcript
JX - Joint Exhibit.

[2] The Director, Office of Workers Compensation programs, has accepted liability under section 8(f) of the act should I find that Claimant is entitled to permanent disability benefits (EX 17). Thus, section 8(f) liability is not an issue in the present case.

STIPULATIONS

Employer and Claimant stipulated to and I find the following facts.

1. An employer/employee relationship existed at all relevant times;
2. The parties are subject to the jurisdiction of the act;
3. On May 16, 1995, Claimant suffered an injury to her left knee arising out of and in the course of employment;
4. On May 9, 1995, Claimant was diagnosed with bilateral carpal tunnel syndrome which arose out of and in the course of her employment;
5. A timely notice of injury was given by Claimant to Employer for both injuries;
6. Claimant filed timely claims for compensation for both injuries;
7. Employer filed timely first reports of injury and timely notices of controversion with the U.S. Department of Labor;
8. Claimant's average weekly wage at the time of her May 16, 1995 injury was $661.80, resulting in a compensation rate of $441.20;
9. Claimant's average weekly wage at the time of her May 9, 1995 injury was $660.20, resulting in a compensation rate of $440.13;
10. Claimant was paid temporary total and permanent partial disability benefits for a rating evidenced by form LS-208 (JX 1);
11. Claimant was paid temporary total and permanent partial disability benefits for a rating for the periods listed on form LS-208 (JX 1);
12. As a result of the May 9, 1995 injury, Claimant has been unable to return to her pre-injury employment with Employer; and
13. Employer has provided Claimant with medical treatment as required by section 7 of the act.

(JX 1)

FINDINGS OF FACT

In 1974, Queen E. Wiggins ("Claimant") began working for Newport News Shipbuilding and Dry Dock Company ("Employer") (Tr. 78). On May 9, 1995, Claimant suffered an on-the-job injury to her hands and wrists (JX 1). Claimant was treated for this injury by Dr. Thomas M. Stiles, a board-certified orthopedic surgeon (CX 2 at 5-6). After reviewing Claimant's records and an EMG, Dr. Stiles concluded that Claimant was suffering from bilateral carpal tunnel syndrome (CX 2 at 6-7). Claimant underwent carpal tunnel release surgery to the right hand on January 10, 1996, and to the left hand on September 27, 1995 (CX 2 at 9). On August 7, 1996, Dr. Stiles gave Claimant a two percent permanent disability rating in each of the upper extremities (CX 2 at 10). Dr. Stiles also placed Claimant on permanent work restrictions for her wrists (CX 2 at 47).[3]

On May 16, 1995, Claimant caught her left foot on a flat bar, resulting in an on-the-job injury to her left knee. On May 17, Claimant reported the injury to Employer's clinic (CX 6 at 11). On May 24, 1995, Claimant saw Dr. Wayne T. Johnson for the knee injury. Dr. Johnson placed Claimant on temporary work restrictions but concluded that she would be able return to her regular employment (EX 5(c)). On August 31, 1995, Claimant complained to Dr. Stiles of her left knee catching, popping and giving way (CX 1 at 15). On October 2, 1995, Dr. Stiles examined Claimant's left knee and reviewed X-rays and an MRI of the left knee region. Dr. Stiles concluded that Claimant suffered from a lateral meniscus tear and a probable chondral or loose body (CX 2 at 13). On November 7, 1996, Dr. Stiles performed arthrosporic surgery on Claimant's left knee (CX 2 at 13-14). Originally, Dr. Stiles assigned Claimant a five percent permanent disability rating for the left knee; however, in September, 1997, he increased the rating to fifteen percent because Claimant was losing motion in her knee and had continued complaints of pain and catching (CX 2 at 15).[4] Furthermore, on February 6, 1997, Dr. Stiles placed Claimant on permanent

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[3] The August 7, 1996 work restrictions include the following: (1) no climbing vertical ladders; (2) climbing inclined ladders limited to 1-2.5 hours per sitting; (3) no crawling; (4) kneeling limited to 1-2.5 hours per sitting; (5) squatting limited to 2.5-5 hours per sitting; (6) pushing and pulling limited to 2.5-5 hours per sitting; (7) simple grasping limited to 2.5-5 hours per sitting; (8) firm grasping limited to 1-2.5 hours per sitting; (9) no use of vibratory tools; and (10) no work above shoulders (CX 2 at 47).

[4] Dr. N. Michael Baddar, a physician board-certified in occupational medicine and a consulting physician for Employer, opined that Claimant's condition only merited a two percent impairment rating for the lower extremity. Moreover, Dr. Baddar concluded that Claimant could work without restrictions (EX 13).

work restrictions for the left knee (CX 2 at 48).[5]

Claimant last worked for Employer in September, 1995 (Tr. 20). In April, 1996, the U.S. Department of Labor referred Claimant to Charles DeMark, a rehabilitation counselor with Coastal Vocational Services, Inc., to determine whether rehabilitation services would be feasible (Tr. 15-16).[6] Mr. DeMark reviewed Claimant's medical history, work history and education. He also interviewed her on May 14, 1996 (Tr. 18). He arranged for Claimant to take the Wide-Range Achievement Test and the Wechsler Adult Intelligence Survey (Tr. 16-17). These tests indicated that Claimant has a 4.3 grade reading level, a 5.7 grade spelling level, and a 6.5 grade math level. Claimant also has an IQ of 78, placing her in the borderline category (Tr. 17).[7] Mr. DeMark concluded that, if Claimant could pass the GED exam as well as learn basic typing and computer skills, she would be a good candidate for reentry into her community's depressed labor market (Tr. 28-31).[8] Mr. DeMark obtained permission from the U.S. Department of Labor to place Claimant in a special rehabilitation program ("SRP") (Tr. 28).[9] He then enrolled Claimant in an adult education program at Roanoke-Chowan Community College, including a GED preparation course and basic typing and computer classes (Tr. 30-1). Despite putting forth an excellent effort, Claimant did not do well in her typing and computer classes. Moreover, Claimant's instructors did not believe that Claimant would be able to pass the GED in the foreseeable future (Tr. 32; CX 14 at 9-10).

At this point, the Department of Labor gave Mr. DeMark permission to conduct a job search for Claimant (Tr. 33). On July 1, 1997, the News Herald hired Claimant as a paper

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[5] In a facsimile transmission to Charles DeMark dated April 8, 1998, Dr. Stiles indicated that the February 6, 1997 restrictions were void (CX 8 at 2). Dr. Stiles submitted with his fax a revised copy of Claimant's permanent work restrictions regarding her left knee (CX 8 at 5).

[6] Mr. DeMark is a licensed professional counselor in North Carolina and a certified rehabilitation provider in Virginia. He is certified as a rehabilitation counselor by the U.S. Department of Labor in Washington, DC and Norfolk, Virginia. Moreover, Mr. DeMark is a certified rehabilitation counselor, certified case manager and a diplomate with the American Board of Vocational Experts (Tr. 15)

[7] The categories for intelligence are listed here in ascending order: mentally retarded, borderline, low average, average, above average and superior (Tr. 17).

[8] Claimant lives in Hertford County, North Carolina. According to Mr. DeMark, the employment data for this area reveals a labor market with very few entry-level positions except in the fields of trucking and nursing, for which Claimant is unqualified (Tr. 24-8). Furthermore, almost all of the available jobs in the area require either a high school diploma or a GED, neither of which Claimant possesses (Tr. 30).

[9] An SRP is an exception to the Department of Labor's regulations requiring a rehabilitation counselor to develop a plan for a vocational plan for a client within ninety days. Mr. DeMark testified that having a case placed in SRP status is the exception and not the rule (Tr. 28-9).

carrier - a position in which Claimant is still employed (Tr. 90-1). In this position, Claimant works four to five hours per day three days a week and receives seventeen cents for every paper delivered. Although she earns $103 per week, she must provide her own vehicle, car insurance, and fuel (Tr. 90-4). Furthermore, Claimant's family assists her in re-rolling the newspapers for delivery (Tr. 94; CX 9-9).

On March 2, 1998, at the request of Employer, David Karmolinski, a vocational consultant with Resource Opportunities, Inc, prepared a labor market survey for Claimant (EX 15).[10] Mr. Karmolinski reviewed the following: available medical records; Claimant's job application with Employer; vocational reports by Coastal Vocational Services, Inc. and Atlantic Rehabilitation Services, Inc.; and Dr. Stiles' medical reports and work restrictions (EX 15(b)). Mr. Karmolinski identified four general occupations which he deemed appropriate for Claimant: (1) cashier; (2) door greeter; (3) delivery driver; and (4) dispatcher. He listed seven specific positions appropriate for Claimant and available within her community: (1) cashier for Food Lion in Murfreesboro, North Carolina; (2) cashier for Revco in Murfreesboro, North Carolina; (3) cashier for Red Apple in Ahoskie, North Carolina; (4) door greeter for Wal-Mart in Ahoskie, North Carolina; (5) delivery driver for Pizza Hut in Suffolk, Virginia; (6) dispatcher for Johns Brothers Security in Norfolk, Virginia; and (7) delivery driver for Papa John's Pizza in Suffolk, Virginia (EX 15 (e) -(h)). He concluded that Claimant has a residual wage-earning capacity of $5.44 per hour or $217.60 per week on a full-time basis (EX 15(d)).

Mr. Karmolinski conducted a supplemental labor market survey in which he identified additional positions appropriate for Claimant (EX 18 at 29). These new positions included the following: (1) security guard for Advance Guard at an Avis Rent-A-Car site; (2) unarmed security guard for Clemons Security at Suffolk, Virginia Department of Transportation site; (3) unarmed security guard for Clemons Security at Peanut City site in Norfolk, Virginia; (4) cashier for Denbigh Toyota in Hampton, Virginia; (5) sander for Brandywine Wood Crafts in Yorktown, Virginia; (6) order taker for Chanello's Pizza in Newport News, Virginia; (7) courier for Clemons Courier Service in Norfolk, Virginia; and (8) a donation scheduler for Disabled American Veterans in Hampton, Virginia (EX 18 at 29-40).[11]

In letters dated March 19, 1998 and August 6, 1998, Mr. DeMark reviewed the positions listed by Mr. Karmolinski. Based on Claimant's low reading and writing abilities; borderline intelligence and work restrictions; the distance from Claimant's home to prospective job sites; and personal contact with some of the employers listed, Mr. DeMark

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[10] Mr. Karmolinski is a certified rehabilitation provider in Virginia (EX 18 at 4).

[11] With regard to the security guard positions, Dr. Stiles said his approval of such positions would depend on the amount of walking required (Tr. 34-5). Furthermore, Mr. Karmolinski reiterated in his supplemental report that the Ahoskie Wal-Mart door greeter position remained available (EX 18 at 31).

opined that none of the specified positions was appropriate for Claimant (CX 8 at 6-7; CX 15).

DISCUSSION

A. Establishing Total Disability

1. Legal Standards

To establish entitlement to total disability benefits under the act Claimant bears the burden of establishing a prima facie case of total disability by showing that she cannot return to her usual employment due to her work-related injury. Trans-State Dredging Co. v. Benefits Review Board (Tarner), 731 F.2d 199 (4th Cir. 1984). If Claimant meets this burden, the burden shifts to Employer to show the availability of realistic job opportunities in Claimant's geographic area, which Claimant, by virtue of her "age, background, employment history and experience, and intellectual and physical capabilities," is capable of performing and could secure if he diligently tried. Id, 731 F.2d at 201 quoting New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-1043 (5th Cir. 1981). Furthermore, to determine whether a job opportunity is realistic, Employer must elicit "the precise nature, terms, and actual availability" of the position. Thompson v. Lockheed Shipbuilding and Construction Co., 21 BRBS 94, 97 (1988) citing Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687 (5th Cir. 1986), cert. denied, 107 S. Ct. 101 (1987). Finally, Employer must demonstrate the availability of a range of jobs, not just one. Lentz v. Cottman Co., 852 F.2d 129 (4th Cir. 1988).

2. Claimant Has Established Her Prima Facie Case

Both parties agree that Claimant cannot return to her usual employment due to her May 9, 1995 work-related injury (JX 1). Based on the opinion of Dr. Stiles, Claimant's treating physician, I find that, because of both her May 9 and her May 16, 1995 on-the-job injuries, Claimant is unable to return to her usual employment.[12] Therefore, Claimant has

[12] Employer suggests that Claimant is not disabled by her May 16, 1995 knee injury. As proof, it submits the medical report of Dr. Baddar, who concluded that Claimant had only a minor impairment in her left knee and could return to work without restrictions. Employer's brief at 44; EX 13. Dr. Baddar's report is in obvious conflict with that of Dr. Stiles, a board-certified orthopedic surgeon and Claimant's treating physician. Dr. Stiles opined that Claimant suffers from a fifteen percent permanent impairment of the left knee and requires permanent work restrictions (CX 2 at 15, 48).

established a prima facie case for total disability for the period from March 17, 1997 to June 30, 1997 and for the period from July 1, 1997 to the present and continuing. See Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966)(Where Claimant sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for compensation purposes); see also Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968)(If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable).

3. Suitable Alternative Employment

a. David Karmolinski's March 2, 1998 Labor Market Survey

To meet its burden, Employer submits the labor market survey of Mr. Karmolinski dated March 2, 1998 (EX 15). In his report, Mr. Karmolinski identified seven positions reasonably available to Claimant (EX 15(e)-(h)). I shall consider each position separately.

1. Cashier for Food Lion in Murfreesboro, North Carolina

Mr. Karmolinski met with Bobby Boyd, manager of the Food Lion store in Murfreesboro, North Carolina (EX 18 at 10-11). Mr. Karmolinski testified that he was told by Mr. Boyd that, while he preferred applicants with experience working with the public and as cashiers handling money, such experience was not necessary (EX 18 at 11). Furthermore, Mr. Karmolinski visited the store and observed that the employees "appeared to be of the high-school age, that they have not graduated high school" (EX 18 at 12). He concluded from this observation that Claimant need not have a diploma to work as a cashier (Id). Although Mr. Boyd believed that he had hired a cashier in 1996 and 1997, he was unable to indicate how often (EX 18 at 13). Mr. Karmolinski stated that this Food Lion Store hires "occasionally" and that it hires approximately one applicant per month (Id).

In reply, Claimant submits a letter dated March 19, 1998 from Mr. DeMark (CX 8 at 6-7). In this letter, Mr. DeMark stated that he, too, had contacted the Murfreesboro Food Lion and spoke to Mr. Cason, the assistant manager. Mr. Cason informed Mr. DeMark that "he prefers a high school education, reading and writing ability, experience working with the public and experience as a cashier handling money" (CX 8 at 6). Mr. Cason also said the job required lifting between ten and twenty pounds and that the entire shift is spent on

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I find that, because he was Claimant's treating physician, Dr. Stiles' opinion is entitled to greater weight. Morehead Marine Services, Inc. v. Washnock, 32 BRBS 8, 11 (CRT) (6th Cir. 1998), citing Tussey v. Island Creek Coal Co., 982 F.2d 1036, 1042 (6th Cir. 1993)("Generally, an ALJ is entitled to give greater weight to the opinion of a treating physician than to that of non-treating physicians."). Furthermore, case law is clear that, where a claimant sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for compensation purposes. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966).Therefore, I find that Claimant's knee injury along with her hand condition is a compensable disability under the act and that the proper disability rating is fifteen percent as outlined by Dr. Stiles.

one's feet (Id). Based on Mr. Cason's description and Claimant's physical and mental limitations, Mr. DeMark opined that the Food Lion position would be inappropriate for Claimant (Id at 7).

As to the suitability of this position for Claimant, I cannot give any weight to the opinion of Mr. Karmolinski. First, Mr. Karmolinski based his opinion that a high school diploma is unnecessary for this position on the fact that he saw employees that looked too young to have graduated high school. His opinion is pure speculation without the slightest attempt to verify this conclusion. Claimant has no diploma, nor is she expected to obtain a GED in the foreseeable future (Tr. 32; CX 14 at 9-10).

Second, Mr. Karmolinski was aware of Claimant's test results indicating low reading, spelling, and math abilities, as well as borderline intelligence. In fact, Mr. Karmolinski acknowledged that Claimant's test results were lower than average for the applicant pool, with which he is familiar. He also admitted that the test results of his applicant pool are not normally high to begin with (EX 18 at 46-7). Given these facts, Mr. Karmolinski's conclusion that this position is suitable for Claimant fails to take into account Claimant's educational background and mental capabilities. See Mendez v. National Steel and Shipbuilding Co., 21 BRBS 22, 24 (1988)(On the basis of vocational expert's testimony that the claimant was deficient in basic skills as verbal communication, reading, writing, and math, the administrative law judge properly found that employer had not established that parking lot attendant and security guard positions were reasonably available to claimant).

Third, Mr. Boyd informed Mr. Karmolinski that he was unsure how often he had hired cashiers in 1996 and 1997. Furthermore, Mr. Karmolinski testified that this store hires only "occasionally" at the rate of one position per month (EX 18 at 13). These facts, taken together, are insufficient to establish that the cashier position was regularly available for the period from March 17, 1997 to June 30, 1997. See Edwards v. Director, OWCP, 999 F.2d 1374, 1375 (9th Cir. 1993) (To meet burden of proof, employer must establish that employment must be sufficiently regular); see also Turner, supra, 661 F.2d at 1042-1043 (To meet its burden, the employer must demonstrate that there is a reasonable likelihood that a claimant, given her background, would be hired if she diligently sought the job).

For all of the above reasons, I find that Employer has failed to establish the reasonable availability of this position for Claimant.

2. Cashier for Revco in Murfreesboro, North Carolina

Mr. Karmolinski testified that he spoke with Sandy Carr, the store's manager (EX 18 at 13). Ms. Carr informed him that an applicant need not have cashiering experience (Id). Furthermore, based on his observations of employees working at the Murfreesboro store, he opined that a high school diploma was unnecessary; also, he testified that his opinion was substantiated by Ms. Carr (EX 18 at 14).

Mr. DeMark also contacted Ms. Carr about the Revco position. However, he stated

that Ms. Carr informed him that the position "requires specific experience as a cashier, high school diploma, reading and writing abilities, experience working with the public, cashier experience and stocking experience" (CX 8 at 6)(emphasis added). Furthermore, each cashier works an eight- hour shift, which consists of standing, walking and lifting twenty to thirty pounds. Finally, Ms. Carr told Mr. DeMark that the store received thirty applications for its last opening and that she hired the applicant with the most experience and education (Id).

At deposition, Mr. Karmolinski had the opportunity to respond to Mr. DeMark's March 19, 1998, letter and he contradicted some of the information contained therein. However, three facts reported by Mr. DeMark remain uncontradicted by Mr. Karmolinski. First, the Revco position would require Claimant to lift between twenty and thirty pounds. Such a requirement is beyond the ten to twenty pound lifting restriction imposed on Claimant by Dr. Stiles (CX 8 at 5). Second, the job requires reading and writing abilities. Given Claimant's borderline intelligence and low reading, spelling and mathematical abilities, it is not clear that Claimant possess the requisite reading and writing skills for this position. Third, Ms. Carr stated that during the last hiring period she chose the applicant with the most education and experience. Besides her mental limitations, Claimant has no experience as a cashier. Hence, Claimant could not reasonably be considered as competitive for this position. Based on the above facts, I find that Mr. Karmolinski did not properly take into account Claimant's physical capacity, mental capacity, or her employment background and, thus, his opinion is not entitled to much weight. Therefore, I find that Employer has not shown this position to be suitable for Claimant.

3. Cashier for Red Apple in Ahoskie, North Carolina

Mr. Karmolinski testified that he spoke with Joe Davis, the lead interviewer for the Ahoskie Employment Security Office (EX 18 at 15; CX 13 at 3). Red Apple was sending its applicants to the employment security office to fill out applications and be interviewed (EX 18 at 16). Mr. Karmolinski stated that Mr. Davis had previously met Claimant and that Mr. Karmolinski discussed with Mr. Davis Claimant's vocational and injury profile. Based on this information, Mr. Karmolinski testified that Mr. Davis believed that Claimant would be a viable candidate for this position (Id).

However, in a deposition on August 20, 1998, Mr. Davis gives a different account of Claimant's employability. He testified that Claimant would not "be competitive for any job that I would have to offer in Hertford County based on her education level, her physical limitations and her background, her training or skills"(CX 13 at 8). Furthermore, on cross-examination, Mr. Davis stated that, while Claimant "could" be considered for such positions, "it depends on the duties involved with the job" (CX 13 at 16).

Mr. DeMark contacted "Carol" at the Murfreesboro Red Apple Store (CX 8 at 6).[13]

[13] Although "Carol's" job title is unclear from Mr. DeMark's letter, it appears that she is in a management position at the Murfreesboro store. For purposes of analysis, I will assume that the

He stated that "she prefers cashier experience and cashiers must be able to lift 25 to 30 pounds, stock shelves, mop and clean bathrooms, in addition to cooking food for their fast food business" (CX 8 at 6).

On this issue, Mr. Karmolinski's testimony is entitled to no weight whatsoever. First, Mr. Davis' deposition testimony makes clear that he did not really believe that Claimant could compete for any job in the area (CX 13 at 8). Second, the record contains uncontradicted testimony that the Red Apple position requires an applicant to lift between twenty-five and thirty pounds. Such a requirement is beyond the work restrictions imposed by Dr. Stiles (CX 8 at 5). Therefore, I find that this position has actually been shown to be unsuitable for Claimant.

4. Dispatcher for Johns Brothers Security in Norfolk, Virginia

Mr. Karmolinski testified that he spoke with Susan Wingo, a dispatch shift supervisor with Johns Brothers Security (CX 16 at 4; EX 18 at 26). According to Mr. Karmolinski, Ms. Wingo informed him that the job entailed visually monitoring a computer terminal which receives radio and telephone activated alarms. Furthermore, he also stated that Ms. Wingo told him that no high school diploma was required for the position (EX 18 at 26; EX 15(g)). Based on his conversation with Ms. Wingo, Mr. Karmolinski concluded that this position is suitable for Claimant (EX 15(g)).

However, in deposition on another matter, Ms. Wingo testified that a high school diploma was "required" (CX 16 at 7). Additionally, within ninety days of being hired, an employee must be certified by the Virginia Department of Criminal Justice. Certification entails taking an eight- hour course and passing a written exam (CX 16 at 8). Mr. DeMark contacted Bob Spear, Ms. Wingo's supervisor. According to Mr. DeMark, "Mr. Spear said Johns Brothers requires a high school diploma, 30 words per minute minimum typing ability for data entry and the ability to read well" (CX 8 at 7).

Once again, I find that Mr. Karmolinski has misstated the opinion of a potential employer. Ms. Wingo specifically testified on deposition that the position required a high school diploma (CX 16 at 7), while Mr. Karmolinski claims that Ms. Wingo told him that a diploma was not required (EX 18 at 26). The record is clear that Claimant does not have a high school diploma. Moreover, it is uncontradicted that Claimant will not be able to pass the GED exam in the foreseeable future. Based on Ms. Wingo's testimony and Claimant's educational background, I find that Claimant has been shown to be unqualified

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requirements for a cashier at the Murfreesboro store are the same or similar to those at the Ahoskie store. Moreover, as stated previously, Mr. Karmolinski was made aware of the contents of Mr. DeMark's letter but did not offer to contradict the information provided by Mr. DeMark (EX 18 at 18).

for this position. Therefore, this job does not constitute suitable alternative employment.[14]

5. Delivery Driver for Pizza Hut and Papa Johns Pizza in Suffolk, Virginia

A. Pizza Hut

Regarding the Pizza Hut position, Mr. Karmolinski testified that he contacted Ron Gilbraith, the store manager (EX 18 at 22). According to Mr. Karmolinski, Mr. Gilbraith said that a high school diploma was not required (EX 18 at 25). Furthermore, a delivery driver must, aside from delivering pizzas, assist in taking orders, assist in making pizzas and boxing them for delivery, and give and receive proper change form customers (EX 15(g); EX 18 at 24). Based on this information, Mr. Karmolinski concluded that this position was suitable for Claimant (Id).

Mr. DeMark contacted Haddie Baker, a delivery driver for this store location (CX 8 at 7). According to Mr. DeMark, Ms. Baker "said that delivery drivers must use their own cars, be able to read signs and maps, wash dishes, sweep the floor and make pizza boxes. Occasionally, delivery drivers may help out with orders so they must be able to read, write and count" (Id). After reviewing the information provided by Mr. DeMark, Mr. Karmolinski did not express any disagreement with Ms. Baker's assessment of the position's requirements (EX 18 at 22-4).

I find that this position has not been shown to be suitable for Claimant. First, it is undisputed that Claimant must be able to sweep floors (CX 8 at 7). Sweeping entails pushing and pulling - activities which Dr. Stiles restricted for Claimant (CX 8 at 5). Second, the record indicates that Claimant would have to use a map as well as be able to read, write and count money. Given Claimant's borderline intelligence and poor reading and writing skills, it has not been shown that Claimant possesses the requisite basic skills for this position.

B. Papa Johns Pizza

Mr. Karmolinski testified that he spoke with Doreen Wilder, the manager of Papa Johns Pizza located in Suffolk, Virginia (EX 18 at 27). He stated that he discussed with Ms. Wilder Claimant's work history and injury profile. According to Mr. Karmolinski, Ms. Wilder informed him that Claimant would be a good candidate for the position (Id).

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[14] I find that, to be a security guard in Virginia, one must be certified by the Department of Criminal Justice and that candidates must pass a written exam (CX 16 at 7). The record is clear that Claimant possesses borderline intelligence and Claimant's teachers have stated that she is unable to pass the GED. Based on the record, Employer has not shown that Claimant would be likely to pass the written examination necessary to be certified as a security guard in Virginia. Therefore, I find that no security guard position has been shown to be suitable for Claimant.

Mr. DeMark also contacted Ms. Wilder (CX 8 at 7). According to Mr. DeMark, Ms. Wilder said that the position requires "a good DMV record, insurance and your own vehicle, the ability to stand and walk for most of the shift, lift 40 pounds and assist in taking orders, cleaning and dishwashing" (Id). Although he disputed the forty-pound lifting requirement, Mr. Karmolinski did not disagree with the rest of the information provided by Mr. DeMark (EX 18 at 28).

Because Mr. Karmolinski has demonstrated a propensity both for mischaracterizing others' opinions and for ignoring or inadequately describing a position's physical requirements, I cannot give preponderant weight to either his comments about this position's lifting requirements or his testimony as to Ms. Wilder's opinion about Claimant's suitability for the position. Furthermore, it remains uncontradicted that this job is full-time and requires the ability to stand and walk for most of the shift (CX 8 at 7; EX 15(g)). In his physical restrictions, Dr. Stiles limited Claimant to (1) lifting no more than ten to twenty pounds, (2) walking no more than two to three hours per day and (3) standing no more than four to five hours per day (CX 8 at 5). Given these work restrictions, I find that this position has not been shown to be suitable for Claimant because it is outside those restrictions.

6. Door Greeter for Wal-Mart in Ahoskie, North Carolina

Mr. Karmolinski testified that he contacted Byron Lawrence, the assistant manager of the Ahoskie Wal-Mart (EX 18 at 18-19). He reviewed with Mr. Lawrence a written job description, which Mr. Lawrence subsequently signed (EX 18 at 19). According to the description, a greeter does not need a high school diploma and must greet customers as they enter the store, assist customers with their packages and gather loose shopping carts in the parking lot (EX 15(f)). According to Mr. Karmolinski, the Ahoskie Wal-Mart hires approximately twice a year. Based on this information, Mr. Karmolinski opined that the door greeter position would be suitable for Claimant (Id).

In his March 19, 1998 letter, Mr. DeMark stated that he spoke with someone named Shelly at the Ahoskie Wal-Mart about this position (CX 8 at 7). According to Mr. DeMark, "door greeters must be able to train for cashier positions, lift 20 to 30 pounds and be able to read, write and perform arithmetic" (Id). In another letter dated August 8, 1998, Mr. DeMark stated that this position requires five hours standing and three hours walking. Moreover, he said that he has dealt with this store in the past and "ha[s] been told that for every opening, they have 20-30 applicants for this position" (CX 15)(brackets added). However, on deposition, Mr. Karmolinski responded to Mr. DeMark's March 19 letter by denying the existence of any lifting requirements for this position (EX 18 at 19-21).

From a physical standpoint, the major difficulty with this position is the twenty to thirty pound lifting requirement. Mr. DeMark states that the requirement exists, while Mr. Karmolinski denies this assertion. Hence, resolution of this question depends on the relative credibility of these two vocational counselors. As I have previously explained, Mr. Karmolinski has misstated other witnesses' opinions and has done an inadequate job of outlining the physical and mental requirements of the positions presented. Therefore, I cannot give preponderant weight to any statement made by Mr. Karmolinski in the present

case absent substantial corroborative evidence. Thus, I find that a door greeter must be able to lift between twenty and thirty pounds. Moreover, based on Claimant's physical restrictions, I find that this position is not suitable for Claimant because it is outside her physical limitations.

Furthermore, it is uncontradicted that the Ahoskie Wal-Mart hires twice a year and receives twenty to thirty applications for the door greeter position (CX 15; EX 15(f)). Based on Claimant's physical restrictions and borderline intelligence, I find that it is not reasonable to consider Claimant to be competitive for this position. Hence, this position has not been shown to be appropriate for Claimant.[15]

b. David Karmolinski's Supplemental Labor Market Survey

Mr. Karmolinski prepared a supplemental labor market and found eight additional positions which, he opined, were reasonably available to and suitable for Claimant. I consider these positions below.

1. Security Guard Positions

In his supplemental labor market survey, Mr. Karmolinski identified three security guard positions: (1) Advance Guard at Avis Rent-A-Car site; (2) Clemons Security at Virginia Department of Transportation site in Suffolk, Virginia; (3) Clemons Security at Peanut City site in Norfolk, Virginia. However, I have already found that Claimant has not been shown to be able to meet Virginia's certification requirements for a security guard and, thus, no security guard position has been shown to be suitable for her. See note 14, infra. Thus, I find that these security positions have not been shown to be suitable for Claimant.

2. Remaining Positions Are Not Within Claimant's Geographic Area

The five remaining positions are located in Norfolk, Hampton, Newport News, and Yorktown, Virginia (EX 18). Claimant has lived in Ahoskie, North Carolina her entire life (Tr. 77). I take official notice of the maps contained at the web page http://www.aol.com/netfind/dci/yellowpages.html. Furthermore, I take official notice of the distances one way from Claimant's address to each specified employer listed below:

[15] This finding applies equally to Mr. Karmolinski's conclusion in his supplemental labor market survey that this position remains reasonably available to Claimant (EX 18 at 31).

Employer	Distance from Claimant's Residence (One Way)
Clemons Courier Service	78.2 miles
Denbigh Toyota	96.2 miles
Chanello's Pizza, Denbigh Blvd. Location[16]	95.5 miles
Chanello's Pizza, Jefferson Avenue Location	87.1 miles
Chanello's Pizza, Warwick Blvd. Location	89.9 miles
Disabled American Veterans	86.4 miles
Brandywine Wood Crafts	100.3 miles

Furthermore, I take official notice that the U.S. government mileage rate is 32.5 cents per mile, which includes both the cost of gas as well as wear and tear on a vehicle. Using this rate, I find the values listed below of Claimant's daily and weekly commuting costs to and from the proposed job sites:[17]

Employer	Round-Trip Distance from Claimant's Residence	Mileage Rate	Daily Commuting Cost	Weekly Commuting Cost
Clemons Courier	156.4 miles	.325	$50.83	$254.15
Denbigh Toyota	192.4 miles	.325	$62.53	$312.65
Chanello's Pizza, Denbigh Location	191 miles	.325	$62.08	$310.38

[16] While Mr. Karmolinski stated that the Chanello's Pizza position was located in Newport News, he did not specify which location. Therefore, for the sake of clarity, I used all three Newport News locations.

[17] In calculating weekly costs, I assumed a five-day work week.

Chanello's Pizza, Jefferson Location	174.2 miles	.325	$56.62	$283.08
Chanello's Pizza, Warwick Locations	179.8 miles	.325	$58.43	$292.18
Disabled American Veterans	172.8	.325	$56.16	$280.80
Brandywine Wood Crafts	200.6 miles	.325	$65.20	$325.98

Mr. Karmolinski concluded that Claimant has a residual wage-earning capacity of $217.60 per week (EX 15(d)). As shown above, her weekly commuting costs to and from each job alone exceed this figure. Furthermore, using the maps provided on the America Online website, it is clear that much of Claimant's traveling would be done on secondary roads. Finally, while Dr. Stiles has stated that Claimant could drive a car, he also concluded that she cannot use her feet to operate foot controls or for any type of repetitive movement (CX 8 at 5). Because Claimant would drive such long distances to and from work on secondary roads, she would be using her feet for more repetitive motion than would be otherwise necessary for driving a reasonable distance from her residence. Thus, the commute to any of the above positions would run afoul of Claimant's work restrictions. For all of the above reasons, I find that all the positions listed above have not been proven to be suitable for Claimant because they have not been shown to be within her geographic area or within her physical limitations. See Kilsby v. Diamond M Drilling Co., 6 BRBS 114 (1977), affirmed sub. nom. Diamond M Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978)(Positions located 65 and 200 miles away from claimant's residence are not within his geographic location, even though he took such jobs prior to his injury).

In sum, Employer has failed to demonstrate suitable alternative employment for Claimant using vocational expert testimony. Mr. Karmolinski's testimony is entitled to little weight because of his propensity for misstating others' opinions as well as his own repeated disregard for Claimant's physical and mental limitations. Moreover, to suggest that Claimant should be required to drive between 160 and 200 miles each day for a minimum wage job is unjust.

c. Claimant's Current Position

Since 1997, Claimant has worked as a part-time paper carrier for the News Herald.

She earns seventeen cents per paper delivered, or $103 per week, and must provide her own vehicle, car insurance and fuel. Claimant estimates that she spends approximately twenty-five dollars per week on gas for her paper route (Tr. 92). Moreover, Claimant is required to reroll the papers prior to delivery, an activity in which she is aided by her family (Tr. 94).

Concerning wage-earning capacity, the rule is as follows:

> Section 8(h) [of the act] . . . provides that a Claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. If they do not, . . . the administrative law judge must calculate a dollar amount which reasonably represents the claimant's wage-earning capacity based on such factors as his physical condition, age, education, industrial history, earning power on the open market, and any other reasonable variable which could form a factual basis for the decision.

Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 345-346 (1988)(brackets & ellipses added). In Shoemaker v. Sun Shipbuilding and Dry Dock Co., 12 BRBS 141 (1980), the administrative law judge held that, although claimant was employed part-time as a bus driver, he was entitled to total disability benefits. Id, 12 BRBS at 144. On appeal, the Board reversed on the grounds that "it appears that Claimant performs most of his duties satisfactorily and receives wages because he does so." Id, 12 BRBS at 145. Moreover, in Del Vacchio v. Sun Shipbuilding and Dry Dock Co., 16 BRBS 190 (1984), the Board held that, where the record indicates that a claimant has continued to perform his usual job adequately, regularly and without receiving undue help, his actual wages fairly reflect his wage earning capacity. Id, 16 BRBS at 194. Taken together, these cases stand for the proposition that, if a claimant performs her current position adequately, regularly and without undue help, her actual wage reasonably represents her wage-earning capacity under section 8(h) and, thus, total disability benefits are inappropriate.

Employer argues that Claimant's salary as a paper carrier is an adequate representation of her wage-earning capacity and, thus, she is not entitled to total disability benefits. Employer's brief at 18-20. However, the present case is distinguishable from Shoemaker and Del Vacchio because Claimant does not perform her delivery duties without undue help. As part of her responsibilities, Claimant must reroll 200 newspapers for delivery (Tr. 91). Because of increasing difficulty with her hands, Claimant receives uncompensated help from her family in rerolling the papers (Tr. 94). Under these circumstances, I cannot find that Claimant's wages from this position reasonably reflect her wage-earning capacity.[18]

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[18] An alternative rationale for finding that Claimant's wages do not fairly represent her wage-earning capacity is that, being self-employed, Claimant does not derive substantial or significant income from her self-employment. In a line of cases, the Board has held that, where a claimant

Under section 8(h), I must now determine a dollar amount for Claimant's wage-earning capacity based on Claimant's physical condition, age, education, industrial history and earning power on the open market. See Harrison, supra. Both Mr. DeMark and Joe Davis opined that, based on Claimant's educational level, physical limitations, background, training and skills that Claimant is not competitive for any position in her community (Tr. 40-2; CX 13 at 8). The facts upon which Mr. DeMark and Mr. Davis base their opinion are consistent with those contained in the record. Furthermore, I have already found that the fifteen positions listed by Mr. Karmolinski are inappropriate for Claimant and that Mr. Karmolinski's opinion is entitled to little weight. Based on a preponderance of the evidence, I find that Claimant's wage-earning capacity is zero. Because Employer has failed to meet its burden, Claimant is entitled to total disability benefits under the act.

B. Maximum Medical Improvement

A disability will be considered permanent if and when the employee's condition reaches the point of maximum medical improvement ("MMI"). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989) The date on which Claimant's condition has reached MMI is determined primarily by medical evidence of record. Trask v. Lockheed Shipbuilding & Const. Co., 17 BRBS 56, 60 (1985).

On August 7, 1996, Dr. Stiles assigned Claimant a permanent disability rating and permanent work restrictions for her carpal tunnel syndrome (CX 2 at 10, 47). Furthermore, Dr. Stiles assigned Claimant the first set of permanent work restrictions for her knee injury on February 6, 1997 (CX 2 at 48). Based on this evidence, I find that Claimant reached MMI for her hand condition on August 7, 1996 and for her knee injury on February 6, 1997.

In this case, Claimant is requesting temporary total benefits for the period between March 17, 1997 and June 30, 1997 as well as permanent total benefits for the period July 1, 1997 to the present and continuing. However, the record establishes that Claimant reached MMI for both injuries prior to March 17, 1997. Thus, I find that Claimant is entitled to permanent total disability benefits for both the period between March 17, 1997 to the present and continuing. See Ballesteros v. Willamette W Corp., 20 BRBS 184, 186 (1988)(Medical evidence determines start of permanent disability, regardless of economic or vocational considerations); see also Berkstresser v. Washington Metro Area Transit

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receives substantial or significant income from self-employment, his wages adequately reflect his wage-earning capacity and thus is not entitled to total disability benefits. See Sledge v. Sealand Terminal, Inc., 14 BRBS 334 (1981); see also Mitchell v. Bath Iron Works Corp., 11 BRBS 770, 779 (1980); see also Wise v. Horace Allen Excavating Co., 7 BRBS 1052, 1057 (1978).

In this case, Mr. DeMark testified that Claimant is not an employee of the News Herald; rather, she is an independent contractor (Tr. 38-9). As an independent contractor, Claimant may be considered self-employed. The record indicates that Claimant makes $103 per week but spends approximately $25 per week on gasoline alone. Therefore, I find that Claimant's self-employment income is neither substantial nor significant and, therefore, that it is not a reflection of her wage-earning capacity.

Auth., 16 BRBS 231, 234 (1984), rev'd on other grounds sub nom. Director, OWCP v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)(Evidence of ability to do alternative employment is not relevant to determination of permanency).

C. Compensation Rate

In this case, two compensation rates have been stipulated by the parties. The first compensation rate applies to Claimant's May 9, 1995 injury and amounts to $440.13 per week. The second rate applies to her May 16, 1995 injury and equals $441.20 per week (JX 1). In light of my conclusion that Claimant has undergone a single period of permanent total disability, the question is, which rate should control ?

Although there is no case law on this question, I have already found that both Claimant's hand and knee injuries are compensable. See O'Leary, supra; see also note 12, infra. Because both conditions are compensable, Claimant should get the benefit of the later, and slightly higher, compensation rate. See Voris v. Eikel, 346 U.S. 328 (1953)(The act must be construed liberally in favor of the claimant). Thus, I find that the applicable compensation rate is $441.20 per week.

ORDER

It is hereby ORDERED that:

1. Employer, Newport News Shipbuilding and Dry Dock Company, shall pay to Claimant, Queen E. Wiggins, permanent total disability benefits at the rate of $441.20 per week for the period beginning March 17, 1997 through the present and continuing.

2. At the expiration of 104 weeks after March 17, 1997, such compensation shall be paid by the Special Fund established pursuant to 33 U.S.C. 944. Any overpayment shall be reimbursed to Employer by the Special Fund with interest at the Treasury-bill rate.

3. Interest at the rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

4. Within twenty days of the receipt of this order, Claimant's attorney shall submit a fully supported fee application, a copy of which shall be sent to

opposing counsel, who shall have ten days to respond with objections thereto.

5. All computations are subject to verification by the District Director.

6. Employer shall receive credit for all compensation already paid.

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/rjl
Newport News, Virginia